Torch Operating Co. *and* International Union of Petroleum and Industrial Workers. Case 31–CA–20895

April 11, 2003

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On March 8, 1996, Administrative Law Judge Michael D. Stevenson issued his decision in this case, finding that the Respondent was a successor employer to Unocal with respect to certain Lompoc, California facilities and that the Respondent failed to show that, at the time that it refused to recognize and bargain with the Union, it had a good-faith doubt of the Union's majority status. The judge thus found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees.

On January 28, 1997, the Board issued a Decision and Order affirming the judge's findings and conclusions.[1] The Respondent filed a petition for review of the Board's Decision and Order in the United States Court of Appeals for the Fifth Circuit, and the Board filed a cross-application for enforcement of its Order.

On January 26, 1998, the Supreme Court issued its decision in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, holding, inter alia, that the Board's "good-faith doubt" standard must be interpreted to permit an employer to withdraw recognition of a union when the employer has "reasonable uncertainty" of the union's majority status. Thereafter, the Board filed a motion with the Fifth Circuit to remand the case without prejudice for further consideration in light of *Allentown Mack*. The Fifth Circuit granted the Board's motion. The Board subsequently invited the parties to submit statements of position, and the General Counsel and the Respondent did so.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reconsidered its decision and the record in light of the Supreme Court's decision in *Allentown Mack* and the parties' statements of position and, for the reasons set forth herein, dismisses the complaint. The Board affirms the judge's rulings, findings, and conclusions only to the extent that they are consistent with this Supplemental Decision and Order.[2]

At the time the Respondent refused to bargain with the Union, it employed 36 production and maintenance bargaining unit employees. No exceptions were filed to the judge's finding that 15 of these employees, only 3 less than 50 percent of the unit, made statements demonstrating their opposition to continued union representation. The judge found, however, that other statements relied on by the Respondent were not sufficient to raise a good-faith doubt as to any additional employees' support for the Union. The judge, therefore, rejected the Respondent's good-faith doubt defense.

As previously stated, the Supreme Court in *Allentown Mack* clarified the good-faith doubt standard as meaning only a good-faith uncertainty, rather than disbelief, as to whether a union bargaining representative has the support of a majority of the unit employees. In light of this clarification, the Court repudiated the approach used by the judge here, and by the Board generally, to analyze the sufficiency of certain kinds of employee statements as objective proof of a good-faith doubt. As the Board explained in a later case:[3]

> Prior to *Allentown Mack*, the Board consistently declined to rely on certain kinds of evidence to establish a good-faith doubt. For example, the Board did not consider employees' unverified statements regarding other employees' antiunion sentiments to be reliable evidence of opposition to the union. Similarly, the Board viewed employees' statements expressing dissatisfaction with the union's performance as the bargaining representative as not showing opposition to union representation itself. The Board's treatment of such evidence was consistent with the good-faith disbelief standard that the Board applied. But, as the Court held in *Allentown Mack*, the Board's good-faith doubt standard could only mean good-faith uncertainty, and either of those kinds of statements could contribute to such uncertainty.

The Respondent now contends that many of the statements that the judge rejected meet the evidentiary standard that *Allentown Mack* prescribed. Among those statements are statements made by Union Steward Timothy Munoz to Randy Bailey, the Respondent's vice

[1] 322 NLRB 939. The Board modified the judge's recommended Order in accordance with its decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[2] On Dec. 17, 2001, the Board issued an order to show cause why the Respondent's good-faith doubt contention should not fail under *St. Elizabeth Manor*, 329 NLRB 341 (1999). *St. Elizabeth Manor* held that challenges to a union's majority status were precluded for a reasonable period of time after a successor employer's obligation to recognize an incumbent union arose. Subsequent to issuance of the Board's show cause order, the Board in *MV Transportation*, 337 NLRB 770 (2002), overruled *St. Elizabeth Manor* and renounced the successor bar doctrine. Accordingly, *St. Elizabeth Manor* does not affect the disposition of this case.

[3] *Levitz*, 333 NLRB 717, 727 (2001) (footnotes omitted). *Levitz* changed the standard for employer withdrawal of recognition but made that change prospective only. Consequently, the *Allentown Mack* standard remains applicable in the present case.

president of production. Munoz, in a meeting with Bailey, said that he was a union steward but that the Union was not very strong, that it was consolidating offices, and that there was not "a whole lot of support for the Union" among employees.

Under *Allentown Mack*, one employee's statement about other employees' union sentiments may be objective proof supporting a good faith reasonable "uncertainty" regarding a union's majority support. In this case, Munoz' statement that there was not "a whole lot of support for the Union" among employees is particularly significant because Munoz was a union steward. As a steward, Munoz likely had contact with employees concerning union matters and would have reason to know about employee sentiment concerning the Union. Moreover, it is unlikely that a steward would tell a company official that his union has little support if the steward did not believe it to be true. Thus, steward Munoz's statement to Bailey that there was not "a whole lot of support for the Union" among employees could reasonably be viewed by the Respondent as a significant indicator of employee sentiment.

In sum, we find that Munoz' statement taken together with the statements of 15 individual employees demonstrating opposition to continued union representation were sufficient objective evidence to support the Respondent's reasonable good-faith doubt, defined in *Allentown Mack* as "uncertainty," that the Union continued to have the support of a majority of the bargaining unit's 36 employees.[4] Accordingly, we conclude that the Respondent did not violate Section 8(a)(5) and (1) when it failed and refused to recognize and bargain with the Union. We, therefore, enter the following order dismissing the complaint.

ORDER

The complaint is dismissed.

[4] We need not, therefore, consider the Respondent's contentions concerning other employee statements that the judge found insufficient to support reasonable doubt of the Union's majority status.